Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

DIANE DREKSLER,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Petition for Writ of Certiorari to the Appellate Court of Illinois, Second District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

SHOULD THIS PETITION BE GRANTED SINCE PETITIONER'S DUE PROCESS RIGHTS WERE CLEARLY VIOLATED WHEN FEDERAL GOVERNMENT AGENTS ENTRAPPED PETITIONER INTO COMMITTING A CLASS X DELIVERY OF QUAALUDES WHEN SHE WAS NOT PREDISPOSED TO DO SO, AND THEN SUBJECTED HER TO A HARSHER STATE COURT PROSECUTION?

II.

SHOULD THIS PETITION BE GRANTED SINCE PETITIONER'S RIGHT TO CONFRONT HER WITNESSES WAS VIOLATED WHEN THE TRIAL COURT DID NOT ALLOW HER TO CROSS-EXAMINE THE STATE'S STAR WITNESS ABOUT HIS OCCUPATION AS A MARIJUANA DEALER?

III.

SHOULD THIS PETITION BE GRANTED SINCE PETITIONER'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS DENIED WHEN HER COUNSEL INJECTED ARGUMENT BEFORE THE JURY AND SOLICITED TESTIMONY FROM THE STATE'S KEY WITNESS REGARDING DREKSLER'S PREVIOUS MARIJUANA POSSESSION AND USE?

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Petition for Writ of Certiorari to the Appellate Court of Illinois, Second District

PETITION FOR WRIT OF CERTIORARI

Petitioner, Diane Dreksler, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Illinois Appellate Court, Second District.

OPINIONS BELOW

The unpublished opinion of the Illinois Appellate Court, Second District is *People of the State of Illinois v. Diane Dreksler* (No. 2-93-0444; June 20, 1994) and appears as Appendix A to this Petition.

JURISDICTION

On October 6, 1994, the Illinois Supreme Court denied Petitioner's request for leave to appeal from the adverse judgment of the Illinois Appellate Court. *See* Appendix B. This petition is filed within ninety days of that order and is thus timely.[1] This Honorable Court's jurisdiction is invoked under 28 USC § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> [No] State shall deprive any person of life, liberty, or property, without due process of law.

The Sixth Amendment to the United States Constitution provides in pertinent part:

> [The] accused shall enjoy . . . the right to be confronted with the witnesses against him . . . and to have the assistance of counsel for his defense.

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[1] In an effort to be as accurate as possible regarding the due date of the present Petition, counsel requested the Clerk of this Honorable Court to compute the due date. Both the Clerk and counsel determined the due date to be January 6, 1995.

STATEMENT OF THE CASE

Petitioner Diane Dreksler is a forty (40) year old teacher and artist. (Tr. 929)[2] She received her bachelor's degree in education from Northeastern Illinois University and thereafter began her career as a substitute teacher in Chicago schools. (Tr. 929) Diane became a part-time art instructor at Maple School in Northbrook, Illinois, and soon earned a position as a full-time art teacher there. (C. 929) She has taught at Maple for the past seventeen (17) years, and recently became the head of their fine arts department. (Tr. 930) As a part-time artist, Ms. Dreksler specializes in sports illustrations, portrait work, and fabric sculptures. (Tr. 931) Before the present conviction, Diane had no prior criminal record.

Diane developed a colon/bowel condition which prohibited her from drinking alcohol, and she began using quaaludes as an alcohol substitute. (C. 316; Tr. 942, 957, 1091) On about ten occasions, Richard Hayes ("Ricky") and his wife gave Diane one or two quaaludes. (Tr. 957) Diane never purchased quaaludes from Richard Hayes, nor did she ever sell quaaludes. (Tr. 959)

Michael Grod was a friend of Diane Dreksler and her former husband for over twenty (20) years. (Tr. 624-625) Diane and her husband divorced in 1986. (Tr. 928) Grod and Michael Dreksler use to work together in cultivating marijuana plants inside the Dreksler home. (Tr. 625) Michael Grod remained an acquaintance of Diane Dreksler after the divorce and continued to speak to her. (Tr. 631) In her conversations with Grod, Diane occasionally mentioned her personal use of quaaludes. (Tr. 644-645)

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[2] "Tr." refers to the trial transcripts, "C." refers to the common law record, and "Exhibit" refers to recorded calls from the trial; these are not attached hereto as part of the Appendix.

On January 13, 1992, Michael Grod was arrested by the DEA for growing and possessing over one hundred marijuana plants in his home. (Tr. 571, 601) Grod immediately agreed to become an informant. (Tr. 494, 605, 708) Grod decided the sole focus of his cooperative efforts would be Diane Dreksler. (Tr. 493, 607) As stated by Grod, "I knew I could set her up", because she "talked" about quaaludes. (Tr. 619, 639-640) By Grod's own admission, he immediately began calling Dreksler for quaaludes. (Tr. 599-600) Agent Jodwalis verified that Grod "constantly" spoke with Dreksler. (Tr. 812) By Grod's own admission, he called Diane several times a month. (Tr. 599-600)

Diane's unrebutted testimony at trial established that Dreksler simply ignored his repeated demands to call Ricky Hayes, a quaalude source. (Tr. 936-939) Diane testified that she wished Grod would "stop bothering me about getting quaaludes." (Tr. 937) Indicative of Diane's reticence was her response in early March:

> If I hear anything I'll let you know . . . I just can't be bothered with this right now and I just don't have anything further to say to you.

(Tr. 939)

In mid-March, Grod's campaign became more aggressive. He called more frequently and began harassing Dreksler to call Ricky Hayes. (Tr. 939-940) The fourth week of March Grod became desperate, apparently feeling the pressure of his cooperation becoming less valuable to the DEA:

> My friend Cass and I have put together $500. I don't care what Ricky has or what he can get. Just promise me that when you hang up the phone you'll call Ricky and get $500 of whatever he has and will you promise me then that you'll call back or I'll call you and try and get some quaaludes for me.

(Tr. 940)

On April 6, 1992, approximately three months after he had signed his cooperation agreement, Grod's persistence paid off and he was finally able to alert the DEA to secretly monitor his calls to Diane. (Tr. 499-500, 714) Yet, Diane remained reluctant:

Dreksler: I don't know, you're asking a lot, because I have people coming to work on my kitchen now and to work on my floors and I don't have time to chase.

Grod: Yeah.

Dreksler: Uh.

Grod: I know if he comes out there with the money he's not going to want to leave Highland Park and come back, what's the best thing for you?

Dreksler: I don't have any questions for you right now. I don't know where Ricky is, I don't know where he'll be today, uh, I don't know what to tell you.

Grod: Uh, oh shit.

Dreksler: I would imagine that he'll be home tonight, but I don't know where I'm going tonight either. I know I might be heading out to Carol Stream to see my sister-in-law.

(Exhibit N-1, Call #3, p. 1-2; Tr. 508) Diane relented and later that day arranged for the purchase of twenty-seven quaaludes for Grod's friend "Cass" (Agent Jodwalis). (Tr. 723, 819, 957)

Diane Dreksler was not arrested after the April 6th delivery. (Tr. 618) Rather, Grod set out to recruit her into the Class X offense. On April 7, 1992, Grod engaged Dreksler in another tape recorded telephone conversation regarding a second, larger purchase of quaaludes from Ricky Hayes. (Tr. 523, 750) Grod asked her what larger quantity purchase would have to be made to get a "cut" in price. (Tr.

525-526) On April 8th, in one of three calls made to Diane by Grod, Diane again expressed reticence:

Dreksler: Oh fuck, this is a pain in the ass for me.

Grod: Ya me too.

Dreksler: If it worked out like today by 4 between 4 and 5, it's not an inconvenience for me.

Grod: But then we would only be getting a hundred today, if we picked them up today?

Dreksler: Well maybe that's all you should get for today.

(Exhibit N-1, Call #5, p. 2; Tr. 534-535)

Grod continued to push for the much larger quantity, however. Dreksler relented and arranged for "Cass" (Jodwalis) to buy one thousand (1000) quaaludes from Ricky for $16,500, for which she was only to receive a few quaaludes for her own personal use. (Exhibit N-1, Call #7, p. 1-2)

Jodwalis arrived at Dreksler's house and Diane said that Ricky Hayes had dropped off the quaaludes earlier that day. After Diane showed the quaaludes to Jodwalis, several DEA agents kicked in her door and Diane was arrested. (Tr. 802-803) She told the agents immediately that her source was Ricky Hayes. (Tr. 780)

At no time during their ensnaring of Diane Dreksler did Grod or Jodwalis come into contact with any transporter of drugs, or "mule", employed by Dreksler, did they discover her using any drug code words, nor did they see her wearing a beeper. (Tr. 614-615, 823-824) Nor was any marijuana, other quaaludes, or any drugs or drug paraphernalia found in Dreksler's home. (Tr. 826)

In her defense, Diane called several character witnesses. The trial court ordered the testimony of three character witnesses stricken, and instructed the jury to not consider such testimony in any way. Of the witnesses (two teachers, a photographer, a lawyer and an investment banker) whose

testimony the court did not strike, each testified that Diane had an excellent reputation for being a law abiding citizen. (Tr. 855-856, 880-881, 884, 886-7, 904)

Following the jury's extended seven and one half hours of deliberations, during which the jury sent out several questions indicating confusion over the entrapment defense, the jury returned a verdict of guilty. Following arguments on post-trial motions, the trial court sentenced Diane Dreksler to eight years imprisonment. (C. 313-4)

Dreksler filed her appeal and was granted an appeal bond. She argued several issues on appeal: that the State failed to disprove to beyond a reasonable doubt; that the trial court erred in barring the defense from cross-examining the State's star witness, Michael Grod, about his criminal past; that Dreksler's trial counsel rendered ineffective assistance when he introduced prejudicial evidence regarding her prior use of marijuana; that the trial court erred in precluding the defense from adducing evidence of the circumstances surrounding Diane's post-arrest statements and her agreement to cooperate; that the trial court erred in striking the testimony of several of the defense's character witnesses regarding Diane's excellent reputation for being a law abiding citizen and precluded her character witnesses from testifying that Diane had a good reputation for honesty when her veracity was repeatedly attacked; that the trial court erred in precluding the defense from introducing evidence that Diane had no criminal past; that the trial court erred in responding to jury questions regarding entrapment by reiterating the other crimes instruction and refused to restate the entrapment instruction; that Diane was penalized for exercising her constitutional right to a jury trial when the judge originally indicated he would impose a six-year sentence but sentenced the defendant to eight years after trial; and, that the trial court erred at sen-

tencing when it relied on non-record information and considered an aggravating factor implicit in the offense.

The Appellate Court of Illinois for the Second District affirmed the conviction, but vacated the sentence and remanded for resentencing. Specifically, the appellate court found that: the jury could have found Diane was predisposed to commit the offense, and therefore could have rejected the entrapment defense; the trial court erred in restricting the defendant's cross-examination of the informant and his criminal past, but that such error was harmless; defense counsel did not render ineffective assistance of counsel; the post-arrest statements and conduct of the defendant were properly excluded as irrelevant; the trial court erred in striking the testimony of the defendant's character witnesses regarding her reputation for law abidingness, but that such error was harmless; the testimony of the defendant's character witnesses regarding her reputation for truth and veracity was properly excluded; the defendant waived argument on appeal that the court erred in barring the defendant from introducing evidence of her lack of prior criminal record; the trial court properly and without prejudice reiterated the other crimes instruction in answer to the jury's questions; there was no cumulative error; there was no evidence in the record that the defendant's sentence was increased for exercising her right to trial and her sentence was not excessive; and, that her sentence was indeed based upon improper considerations. *See* Appendix A. Petitioner awaits resentencing.

REASONS FOR GRANTING THE PETITION

I.

THIS PETITION SHOULD BE GRANTED SINCE PETITIONER'S DUE PROCESS RIGHTS WERE CLEARLY VIOLATED WHEN FEDERAL GOVERNMENT AGENTS ENTRAPPED PETITIONER INTO COMMITTING A CLASS X DELIVERY OF QUAALUDES WHEN SHE WAS NOT PREDISPOSED TO DO SO, AND THEN SUBJECTED HER TO A HARSHER STATE COURT PROSECUTION.

The defense of entrapment lies where a government agent, in his zeal to enforce the law, has originated a criminal plan, has implanted in the defendant's mind that plan, and has induced its commission. *See Jacobsen v. United States*, 503 U.S. ___, 112 S.Ct. 1535, 118 L.Ed.2d 174 (1992). "When the Government's quest for convictions leads to the apprehension of an otherwise law abiding citizen who, if left to [her] own devices, likely would have never run afoul of the law, the courts should intervene." *Jacobsen*. 118 L.Ed.2d at 187.

Illinois statutory and case law is in line with this Honorable Court's rulings identifying the two key issues involved in an entrapment defense as 1) government inducement and 2) a defendant's lack of predisposition. *See Jacobsen*; *Sorrells v. United States*, 287 U.S. 435, 77 L.Ed. 413, 53 S.Ct. 210 (1932). The Illinois Criminal Code codifies entrapment as follows:

> A person is not guilty of an offense if his conduct is incited or induced by a public officer or employee, or agent of either, for the purpose of obtaining evidence for the prosecution of such person. However, this Section is inapplicable if a public officer or employee, or agent of either, merely affords to such person the opportunity or facility for committing an offense in furtherance of a criminal purpose which such person has originated.

720 ILCS 5/7-12. Predisposition depends upon the defendant's willingness to participate in a crime *before* his or her exposure to government agents. *People v. Poulos*, 196 Ill. App. 3d 653, 661, 554 N.E.2d 448 (1990). Other factors to be considered in assessing predisposition in a drug case include: the defendant's initial reluctance or ready willingness to commit the crime; the defendant's familiarity with drugs and eagerness to accommodate drug user's needs; whether the defendant made a profit from the delivery; the defendant's own use of drugs; whether the defendant tested or cut the drugs; whether the defendant was involved in a course of conduct involving similar offenses; whether the defendant had a prior criminal record; and the defendant's subsequent conduct. *Poulos*, 196 Ill. App. 3d at 661, 554 N.E.2d 448. Whether predisposition existed ultimately depends upon the facts of the case. *Id.*

The Seventh Circuit Court of Appeals recently examined the law of entrapment and its relation to a defendant's predisposition. *See United States v. Hollingsworth*, 9 F.3d 593 (7th Cir. 1993). In analyzing the underlying rationale for the entrapment defense, the court recognized that some government stings are necessary to apprehend and convict criminals who have committed a similar offense in the past or are very likely to commit the crime in the future, and thereby protect society. *Id.* at 598. The court restated that the predisposed individual—the one ready and willing to commit the crime that the government has set up before it has been set up—*is* a threat to society. *Id.* However,

> **"A person who would not commit a crime unless induced to by the government is not a threat to society and the criminal law has no proper concern with [her], however evil [her] thoughts or deficient [her] character."**

* * *

> **". . . [w]illingness, the pure mental state, is not enough; there must also be readiness, in the sense that the defendant was poised, was likely, to engage in criminal activity."**

Id. Following its analysis and application to the facts, the court reversed a conviction outright on the basis of entrapment.

A similar result was necessitated by the facts in Petitioner's case. The facts at trial clearly revealed that Diane Dreksler would not have assisted the government confidential informant in obtaining quaaludes had it not been for the informant's implanting of that scheme in her mind, and his inducement of her to carry out the act. Had Diane Dreksler been left to her own devices, she would not have been committing quaalude delivery offenses, let alone Class X offenses. She had no predisposition to do so; the State did not show that she committed such a crime before or that she was likely to commit such a crime in the future.

Before her exposure to Grod and other government agents, Diane Dreksler had absolutely no inclination to sell quaaludes. The record is barren of evidence that she ever committed any previous drug delivery; both Dreksler's and Grod's testimony established such. Though Diane's language on the taped conversations showed her familiarity with the drug trade, her admitted personal use of quaaludes better explains Diane's knowledge of drug terms. (Tr. 957) This does not make her predisposed to commit quaalude delivery offenses however, especially ones involving a Class X amount.

At trial, the State failed to prove beyond a reasonable doubt that Diane Dreksler had the predisposition to commit a Class X drug offense before her contact with the government agents. Absolutely no evidence supports the notion that Dreksler had previously committed any drug delivery offenses. DEA intelligence did not establish such. Grod did

not so testify, and Dreksler testified that before being asked by Grod, she had never sold any quaaludes, let alone a Class X amount of quaaludes. At best, the evidence showed that Dreksler may have consumed small user amounts of quaaludes and marijuana. But this certainly did not elevate her into a drug dealer, or vest her with the predisposition to commit a Class X offense. Despite this, the government opted to target her, and it took Grod's exploitation of a twenty year friendship and months of unrecorded phone calls to push Dreksler, a school teacher with no criminal record and an excellent reputation, to commit a highly uncharacteristic crime for which she otherwise lacked predisposition. This reeked of entrapment.

Confirming the existence of entrapment, the criminal design in this case originated in the government. The idea to sell a thousand quaalude pills certainly did not originate with Diane Dreksler. She did not approach Grod or Jodwalis, hawking wares. Rather, the plan to get Dreksler to deliver a thousand quaaludes originated with Grod and his DEA handlers. Moreover, manifesting sentencing entrapment, when Grod pressed for a thousand pills, Diane resisted, saying that maybe a hundred is "all you should get for today." (Exhibit N-1, Call #5, p. 2; Tr. 534-535) The government informant, however, refused to accept Diane's reluctance and continued to press for a lager amount—yet another circumstance exhibiting entrapment.

Furthermore, Grod induced Dreksler into committing the offense. Michael Grod cooperated upon his arrest in January, and only had one person in mind to set up: Diane Dreksler. Diane was a "friend" for over twenty years. Acting out of self-interest, Grod knew he could exploit that friendship and set her up. However, it took Grod many unrecorded conversations over several months to even get Dreksler in the position to deliver any quaaludes. Obviously, Dreksler did not ask, nor was she interested, in deliver-

ing quaaludes to Grod when he first contacted her after his arrest. If Dreksler had shown such an inkling, the undercover deal would have occurred much earlier, and Grod would not have waited until April 6th to contact DEA Agent Jodwalis for purposes of finally tape-recording his conversations with Dreksler.

Dreksler's unrebutted testimony about the content of unrecorded telephone conversations between Grod and herself establishes that the State did not disprove entrapment. Commencing in February, Grod began calling Dreksler and asking her to call Ricky for quaaludes. (Tr. 936) Diane did not do so when Grod first called her, and told Grod this when he called back two days later. Undeterred, Grod again directed Diane to call Ricky for quaaludes. Again, Diane did not so. But this did not stop Grod from pressing Diane. (Tr. 937) In mid-February, Diane attempted to defeat Grod's request and told him that she had talked to Ricky, when she did not, so that Grod would "stop bothering" her. (Tr. 937) Grod, however, did not stop bothering Diane and phoned her again in late February asking her to call Ricky for quaaludes. (Tr. 938) Diane, however, did not accede to Grod's request at that time.

The month of March also was filled with telephone calls from Grod to Dreksler, again pressuring Diane to call Ricky for quaaludes. (Tr. 938-40) Finally, at the end of March, Grod demanded that Diane "call Ricky and get whatever he has" as soon as she hung up the phone. (Tr. 940) However, Diane did not agree to deliver quaaludes at that time, and Grod had to repeat his demands in early April.

These unrecorded conversations plainly suggest that Grod, a government informant, entrapped Diane into committing the offense. Significantly, the State did not offer any rebuttal to the defense testimony. The State's failure to rebut these conversations, showing inducement by the gov-

ernment informant, establishes entrapment as a matter of law. *See People v. Poulos*, 196 Ill. App. 3d 653, 661, 554 N.E.2d 448 (1990); *People v. Martin*, 125 Ill. App. 3d 590, 466 N.E.2d 360 (1984).

The undercover tape-recordings made after Grod budged Diane from her initial refusals further exhibit Diane's reluctance to partake. In the first tape-recorded telephone call, Diane told Grod he "asking a lot" and that she did not "know what to tell" him. While Diane made a non-Class X delivery on April 6th, she continued to express reluctance when Grod called her seeking even more quaaludes. On April 8th, Diane informed Grod that "this is a pain in the ass for me," and exposing lack of predisposition to commit a Class X offense, Dreksler suggested that Grod only pick up one hundred (a non-Class X amount), rather than a thousand quaaludes. Persisting in an attempt to get Diane to commit a more severe offense, Grod refused and demanded the larger amount. But even in ensuing conversations after Diane relented, Diane expressed reluctance, saying she "could go away for life," felt "very nervous" and "could not believe we're doing this. . ." Call # 7. Further revealing lack of predisposition to commit a Class X offense, Diane also remarked that she had never seen so much drugs and cash in a transaction in her life.

Additional factors demonstrate that government agents entrapped Diane Dreksler into committing a Class X drug offense. For instance, government agents found none of the trappings of a drug dealer (i.e., beepers, scales, paraphernalia etc.) on or about Diane or in her home. In addition, Diane did not test or cut the drugs in the presence of the agents.

Also, Dreksler did not get involved for significant monetary profit. During the first delivery, Diane handed Jodwalis $5 change. No drug dealer, motivated by monetary

greed, gives $5 change back from $490. And with respect to the second delivery, the tapes show that she was to be given a few quaalude pills.

At bottom, Diane was nothing more than an esteemed 40 year old school teacher and artist who had no prior criminal record and an excellent reputation. While she may have had used marijuana and quaaludes, she certainly did not have a prior inclination to commit Class X drug deliveries before being contacted, pressured and persuaded by the unrelenting government informant. Grod, to escape potential harsh penalties awaiting him in his federal case, induced and persuaded Diane to commit a crime that she obviously would not have otherwise committed if left to her own devices. This amounts to entrapment as a matter of law.

Additionally, Petitioner's due process right were violated when the federal authorities investigating this case and prosecuting Petitioner's confederates in the federal system turned over her case to the harsher state system at the eleventh hour.

The facts surrounding Diane's offense reveal that from the very beginning this was a federal case. The federal investigation relied primarily on the undercover efforts of confidential informant Michael Grod. Grod was arrested and charged federally for possession with intent to distribute one hundred and four (104) marijuana plants found growing in his Hanover Park home.

After Grod was arrested, he agreed to cooperate. He was released on bond, conditioned on his agreement to help make a case against someone else. He signed a cooperative agreement with the federal authorities on January 29, 1992.

The federal authorities, operating under the auspices of the United States Attorney's office, received authorization for the use of consensual eavesdropping devices. Assistant

United States Attorney Ronald May provided the justification, thereby making available the more relaxed federal standards of one-party consensual monitoring. As conceded by the State in pre-trial proceedings, this case involved a "federal undercover investigation."

Diane Dreksler was arrested in her home by Special Agents of the federal Drug Enforcement Agency, with the assistance of the Lake County Metropolitan Enforcement Group. After her arrest, Diane was solicited by the DEA for her assistance and agreed to cooperate. Diane had been advised by the agent that she was in serious trouble, but if she cooperated, the severity of her charges could and would be reduced. Diane told the agents that her source of supply for the quaaludes was Richard Hayes. This, of course, confirmed the federal investigation of Hayes already under way. As the agents testified at trial, their investigative files were labeled "Richard Hayes," not Diane Dreksler.

Diane further advised the agents that Hayes would come to her home to pick up the money she received for his quaaludes. According to all accounts, Diane was nearly hysterical. The agents worked hard at calming Diane so that she might place a call to Hayes. Before that could be done, Hayes himself called Diane, apparently following up on his money. Diane was literally sobbing and in an emotional upheaval at the time of this call. She simply advised Hayes that she could not talk right then. She stated she would call him back later.

Ten (10) minutes did not elapse before Hayes called Diane again. Diane had permitted the agents, secretly, to attach a tape recording devise to her phone, enabling the agents to monitor and record the conversation. During the conversation, because Dreksler was so distraught, the agents passed her notes about how to respond to questions by Hayes. Diane was instructed by DEA Agent Jodwalis to

state that the purported buyer had not given her all the money, that he had pushed her around and that she was emotionally upset. Hayes inquired about whether there were any police present, to which Diane said no.

Diane learned that Hayes could not come to her house to pick up the money because he was babysitting his children. Diane was willing to cooperate with the authorities, but unwilling to deliver the money to Hayes because his kids were at home, as she did not want to see him get arrested in front of his children. Hence, the agents pulled the plug on any further cooperative bargaining, deciding instead to transport Diane to the county jail to be charged with a state felony. In this brief moment, Diane's offense became a state charge.

Thus, though from beginning to end this was a federal investigation, and Grod and Hayes were being dealt with at the federal level, Diane was now in the state system. Diane's being prosecuted by the state may have come about since she did not acquiesce in the final demand given her by the federal agents, or because the federal authorities were concerned with the weakness of their case against her. In pre-trial proceedings the State was adamant in denying any collusion between federal and State authorities seeking to subject Diane Dreksler to the far harsher penalties of the Illinois statutes. However, precisely because this was a "federal undercover investigation", it would appear that Diane Dreksler's prosecution by the State was a direct effort to avoid the more lenient penalties of the federal Sentencing Guidelines. Perhaps there was no collusion seeking to circumvent the Illinois Eavesdropping Statute. But, if federal in nature, why then was it not prosecuted federally? Was it blatant forum shopping calculated solely to punish Diane because she could not bring herself to deliver the money to Hayes and have him arrested in front of his two

(2) children? Because we recognize that there are dual sovereignties with concurrent jurisdiction, perhaps such forum shopping is not actionable. In any event, it's impact must now be seen as nothing less than monumental.

Richard Hayes, also arrested by the federal agents, was charged in federal court. The charges against Hayes involved the identical two (2) transactions of April 6, 1992, and April 8, 1992, for which Diane was charged. Hayes pled guilty to those offenses and admitted to being Diane's source for the very quaaludes which were the subject of Diane's conviction. What was Hayes' punishment?—*eight months in the Salvation Army Work Release Center*, with weekends off. This was not due to a lenient federal judge's mercy, but rather the result of applying uniform federal sentencing law. Similarly, Michael Grod, the lifelong marijuana grower and distributor, *received a federal misdemeanor charge of possession of marijuana for which he was sentenced to 300 hours of community service.*

These disparate results cannot be overstated. Ricky Hayes was Diane's *source*—the person against whom Diane had originally agreed to cooperate, offered evidence and, in fact, secretly tape recorded. Where is the justice in these two (2) widely-disparate results? How does it appear to the public at large that the drug source shall be treated so much more leniently than his "mule?" Hayes, the source of the quaaludes, the leader of the quaalude transactions, the person who was to accept all payment for and profit for the quaaludes, will never see the inside of a prison, state or federal. Additionally, he was not fined. Grod, who has made a living in distributing drugs, has likely already finished his community service and is now free.

In stark and glaring contrast, Diane Dreksler, the first-time offender who the state conceded was receiving no compensation for her involvement, is now facing a sentence of eight years in prison. Though Diane Dreksler is a woman who has never dealt in quaaludes or any other drugs before, and who came into this offense only after months of clever cajoling on the part of a trusted acquaintance, she has already spent five (5) months in prison, *more than the Grod's and Hayes' two sentences combined.* Additionally, through the federal forfeiture proceedings instituted, her car and townhome, for which she had saved over six (6) years and had just purchased shortly before her arrest, were confiscated.

Diane's conduct in this case was not only induced by Michael Grod, but was facilitated by Richard Hayes; a career of drug dealing on one end, and the source for the quaaludes on the other. The outcome that has been reached here, where the uncompensated "mule" in between receives a sentence so grossly exaggerated and disproportionate to those with greater culpability, yields the most unconscionable of unfair results.

II.

THIS PETITION SHOULD BE GRANTED SINCE PETITIONER'S RIGHT TO CONFRONT HER WITNESSES WAS VIOLATED WHEN THE TRIAL COURT DID NOT ALLOW HER TO CROSS-EXAMINE THE STATE'S STAR WITNESS ABOUT HIS OCCUPATION AS A MARIJUANA DEALER.

On January 13, 1992, the DEA arrested Michael Grod for growing approximately 104 marijuana plants in his Hanover Park home. (Tr. 571) The crime carries a five year mandatory minimum sentence in the federal court. *See* 21 U.S.C. § 841(b)(1)(B)(vii). Grod decided to cooperate upon his arrest and Grod signed a cooperation agreement with the DEA on January 29, 1992. (Tr. 579, 601)

Grod was a critical and to some extent the only State witness against Diane Dreksler on the entrapment defense. Grod admitted that he had a number of unrecorded telephone calls with Dreksler between February and April 6th, the date of the first recorded conversation. (Tr. 599-600) No other State witness could testify about the content and tone of these unrecorded telephone calls. Operating as a government agent when he made these calls, Grod plainly had opportunity and motive to induce and entice Dreksler, and Dreksler's unrebutted testimony proves that he did.

Grod was the State's first witness. After asking Grod his age, the prosecutor, taking full advantage of primacy effect, queried: "What is your occupation?" (Tr. 491-92) Grod responded, "I install fences." (Tr. 492) During direct examination, Grod failed to make mention of any other occupation he may have held, including being a marijuana peddler. Thus, the State, through Grod, portrayed its critical and first witness as an ordinary citizen holding legitimate employment.

On cross-examination, the defense sought to question Grod about his employment. The following colloquy occurred:

Q. Mr. Grod, you indicated that your business or occupation is that of a fence installer?

A. Yes.

Q. How long have you been so employed?

A. Off and on since 1970.

Q. Is it not a fact, Mr Grod, that for at least the past 10 to 12 years that your main source of income has been that of a marijuana grower or dealer?

MR. MARGOLIN (Prosecutor): Objection, Judge.

THE COURT: Sustained.

(Tr. 596) A side bar ensued during which defense counsel indicated that he had a good faith basis for the question. (Tr. 597) Defense counsel further argued that the question affected Grod's credibility in that Grod had portrayed himself as "an honest Joe off the street as opposed to one who has for a long time been tied to [illicit] activity." (Tr. 598) In response, the State did not deny that Grod was a long-time marijuana dealer; rather, it argued that the testimony was "irrelevant." (Tr. 597-98)[3] The trial court adhered to its original ruling, stating:

> I think even if he was Manuel Noriega if he was only charged with a Class I possession, I don't think you could go into all the other silliness that he'd had over the years. Because his motive for lying in this case is the federal rap. I don't see any motive for lying if they didn't catch him for the last 30 years and he's been a murderer or whatever the heck he's done. So I am going to limit it to any specific motive that he would have in this case, and certainly there's a clear motive there to go out and get her and to see this case through that the jury can determine whether or not—

(Tr. 598-99)

Later in the cross-examination, defense counsel asked Grod whether he had supplied individuals other than Diane Dreksler with marijuana during the past five years. (Tr. 617) Again, the State objected, and the trial court sustained the objection. (Tr. 617)

By the time Grod stepped off the witness stand, the trial court had completely barred Dreksler from cross-examining him about whether he had an occupation other than being

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[3] The State also suggested that Dreksler could not perfect the impeachment. This, of course, assumed—without basis—that Grod would have denied that he was a marijuana grower for 10 to 12 years.

a "fence installer." Thus, Grod survived cross-examination absent being impugned with an unsavory occupation.

A. The Accused Has A Well-Established Right To Question A Witness About His Unsavory Occupation.

As an evidentiary matter and under the Sixth and Fourteenth Amendments to the United States Constitution and Article I § 8 of the Illinois Constitution, an accused has an undisputed right to confront witnesses. As part of this right, the accused must be allowed to examine a witness about "who he really is"—including queries concerning occupation.

This Honorable Court ensconced this rule over 60 years ago. In *Alford v. United States*, 282 U.S. 686 (1931), defense counsel sought to cross-examine a government witness about his residence. The prosecution objected. Counsel responded that the jury entitled to know "who the witness is, where he lives and what his business is." 282 U.S. at 689. The trial court sustained the objection. On *certiorari*, the Supreme Court reversed the conviction. The Court noted that cross-examination "is a matter of right." *Id* at 691. The Court held that the cross-examiner is entitled to identify the witness in his environment, and may adduce facts discrediting the witness' testimony or showing bias. *Id*. at 691-92. The Court observed:

> It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them.
>
> * * *

> The question "Where do you live?" was not only an appropriate preliminary to the cross-examination of the witness, but on its face, without any such declaration of purpose as was made by counsel here, was an essential step in identifying the witness with his environment, to which cross-examination may always be directed.

282 U.S. at 692, 693.

Alford was reaffirmed in *Smith v. Illinois*, 390 U.S. 129 (1968). There, the State's witness testified on direct examination that his name was "James Jordan." Counsel for the defendant knew otherwise, and attempted to cross-examine the witness about his true name and place of residence. The trial court sustained the prosecutor's objections. Again, the United States Supreme Court reversed for the reasons enunciated in *Alford*.

Similarly, under well-established Illinois law, the accused has an unambiguous right to cross-examine a witness about his or her identity, including occupation. As stated in *People v. Gibson*, 133 Ill. App. 2d 722, 272 N.E.2d 274 (1971):

> It is proper on cross examination of a witness to bring out the witness' unlawful and disreputable occupation and activity as a matter affecting credibility.

Id, 272 N.E.2d at 276. In *People v. Winchester*, 352 Ill. 237, 185 N.E. 580 (1933), the Illinois Supreme Court ruled that it was error to preclude the defendant from ascertaining if a State witness was associated with a house of prostitution. In *People v. Shaw*, 117 Ill. App. 2d 16, 254 N.E.2d 602 (1969), the trial court barred the defense from cross-examining an informant about her current residence and employment on grounds that he had enough acquaintance with the witness and her environment. Following a remand from the United States Supreme Court, the appellate court, on the basis of *Smith* and *Alford*, found reversible error in the trial court's ruling. In *People v. Bond*, 281 Ill. 490, 118 N.E. 14 (1917), the prosecution asked a defense witness whether

she kept a house of ill fame. The Supreme Court found no error in the inquiry, commenting:

> If a witness is engaged in an unlawful and disreputable occupation, in justice and fairness he should not be permitted to appear before the jury as a person of high character who is engaged in a lawful and respectable occupation.

As recognized by the supervising prosecutor during arguments on the motion for new trial in this case, Dreksler should have been permitted to cross-examine Grod about his employment. (Tr. 1067)[4] As a result of Grod's direct examination, the State was permitted to hold its key witness out as having legitimate employment. Defendant was entitled to impeach this testimony. *E.g.*, *People v. Barr*, 51 Ill. 2d 50, 280 N.E.2d 708 (1972) ("The accused has a right to question a witness concerning any matter which goes to explain, modify, or discredit what he said on direct examination."). Moreover, as the above-cited cases hold, Dreksler had a clear right to probe Grod about his illicit employment as a marijuana dealer.

The preclusion of cross-examination compels reversal. "Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them." *Alford*, 282 U.S. at 692. Here, Dreksler was deprived the right to have the jury evaluate Grod's claim that he was a mere "fence installer." Grod unfairly was permitted to hold himself out as having legitimate employment, absent the crucible of cross-examination.

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[4] In response to Dreksler's argument that she should granted a new trial because the court precluded cross-examination about Grod's occupation as a marijuana dealer, the prosecutor "admit[ted] that some of the stuff that Mr. Grod may have done in the past would be something that a jury should hear." (Tr. 1067)

Grod's credibility on the issue of "who he really was" went untested. Dreksler was additionally prejudiced since Grod was a critical witness on the entrapment issue. The trial court's preclusion of cross-examination requires reversal for a new trial.

B. By Barring Cross-Examination About Grod's Uncharged History As A Marijuana Dealer, The Trial Court Improperly Curtailed Dreksler's Right To Establish Grod's Bias, Interest and Motive For Testifying.

As part of the right to confrontation, a criminal defendant has the "wide latitude" to examine a witness on the subjects of bias, interest and motive to testify falsely. *Davis v. Alaska*, 415 U.S. 308 (1974); *People v. Wilkerson*, 87 Ill. 2d 151, 429 N.E.2d 526 (1981); *People v. Barr*, 51 Ill. 2d 50, 280 N.E.2d 708 (1972); *People v. Paisley*, 149 Ill. App. 3d 556, 500 N.E.2d 96 (1986); *People v. Adams*, 129 Ill. App. 3d 202, 472 N.E.2d 135 (1984); *People v. Foley*, 109 Ill. App. 3d 1010, 441 N.E.2d 655 (1982); *People v. Pizzi*, 94 Ill. App. 3d 415, 418 N.E.2d 1024 (1981). "The trial court has no discretionary power to deny the defendant the right to cross-examine the witness to show interest, bias or motive." *Phillips*, 95 Ill. App. 3d at 1020, 420 N.E.2d 837. Bias arises when the witness has something to gain or lose by his testimony. *Id.* To cross-examine on bias, interest and motive, the defense need not show that any actual promises of leniency have been made or that expectations of special favor exist in the witness' mind. *Id.*

In this case, Grod's past marijuana dealing past supplied him with a bias in favor of the State, and an interest and motive to testify against Dreksler. Grod's alleged long-time occupation as a marijuana dealer left him vulnerable to prosecutorial authorities and exposed Grod to enhanced penalties in his pending federal case. Indeed, federal sentencing courts can conduct an almost boundless inquiry into a defendant's background in fashioning a sentence. *See* 18

U.S.C. § 3661 ("No limitation shall be placed on the information concerning the background, character and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."). Further, under the federal sentencing guidelines governing the determination of Grod's sentence, a prison term is calculated on the basis of "relevant conduct," having the potential to enhance a defendant's sentence significantly on the basis of *uncharged* criminal conduct. U.S.S.G. 1B1.3 (sentence is to be determined on the basis of all relevant conduct and not just the acts comprising the count of the conviction).

Thus, a long-time marijuana dealer caught with 104 marijuana plants faces far more prison time than a simple fence installer nabbed with 104 plants. This, of course, gave Grod a motive to testify falsely and curry favor with prosecutorial authorities. Helping the State and the DEA by testifying against Diane Dreksler could, in actuality and in Grod's mind, minimize the penal liability potentially associated with Grod's marijuana dealing past. The trial court, however, precluded Dreksler from questioning Grod in this regard, thereby curtailing Dreksler's right to showing Grod's bias, interest and motive to testify falsely against her. Given that Grod's marijuana dealing, aside from the 104 plants seized from his home, had impact upon his pending criminal case and affected his bias, interest and motive in testifying and rendered him vulnerable to prosecutorial authorities, Dreksler plainly should have been allowed to cross-examine Grod on the subject.

The error requires reversal for a new trial. As the Supreme Court has said, such limitation on cross-examination constitutes "constitutional error of the first magnitude" for which no amount of showing of want of prejudice can cure. *Davis v. Alaska*, 415 U.S. 308, 318 (1974). Moreover, Grod was a key witness for the State. With respect to the

issue of Dreksler's conduct before she was exposed to government agents—critical testimony on the issue of predisposition—Grod was the State's only witness. Reviewing courts in this State have not hesitated to reverse where a trial court improperly limited the testimony of a key prosecution witness, where, as here, the evidence, was close. *See, e.g., People v. Adams*, 129 Ill. App. 3d 202, 208, 472 N.E.2d 135 (1984); *People v. Foley*, 109 Ill. App. 3d 1010, 1016, 441 N.E.2d 655 (1982).

III.

THIS PETITION SHOULD BE GRANTED SINCE PETITIONER'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS DENIED WHEN HER COUNSEL INJECTED ARGUMENT BEFORE THE JURY AND SOLICITED TESTIMONY FROM THE STATE'S KEY WITNESS REGARDING DREKSLER'S PREVIOUS MARIJUANA POSSESSION AND USE.

At trial, in response to the Dreksler's motion *in limine*, the trial court ruled that the State was permitted to introduce evidence of Dreksler's occasional use of quaaludes, but would be barred from eliciting evidence of Dreksler's past possession and use of marijuana. (Tr. 272-277) Incredibly then, without provocation, defense counsel confessed to the jury during his opening statement: "You will hear things about Diane Dreksler. Diane Dreksler had used marijuana in the past." (Tr. 490) Later, in his cross-examination of Michael Grod, defense counsel solicited from Grod that he had supplied Dreksler with marijuana over a period of years. Defense counsel inquired of Grod:

Q: Had you supplied marijuana to Diane?

A: Yes.

Q: For how long?

A: I don't know. Maybe a year, two years. I don't keep track of that.

Q: Two years max?

A: Maybe longer. I just said I don't know.

(Tr. 616-617)

Based on the opening statement and this line of questioning, and at the natural urgings of the prosecution, the court reversed its previous ruling barring evidence of marijuana use and ruled admissible any and all evidence relating to Dreksler's past use of marijuana. (Tr. 621-623) The State was then permitted on redirect of Grod to explore in great detail Dreksler's prior use of marijuana:

Q: Mr. Grod, since first coming in contact, since first meeting the defendant, I think you testified earlier it was 1970, have you observed the defendant smoke marijuana?

THE COURT: You may answer those questions, sir.

A: Yes.

Q: How many times have you observed the defendant smoke marijuana?

A: I don't know.

Q: More than 10?

A: Yes.

Q: More than 20?

A: Yes.

Q: More than 50?

A: Probably.

(Tr. 623)

The *coup de gras* was the State's exhaustive inquiry into the growing of marijuana in Dreksler's home by her ex-husband in the years prior to 1987, the presence of marijuana plants in Dreksler's home for a few months after her husband's departure, and her maintaining of those plants—all these prejudicial allegations seeping into the record absent objection from defense counsel. (Tr. 624-628)

Under *Strickland v. Washington*, 466 U.S. 668 (1984), and its progeny, the admission of Dreksler's other crimes by defense counsel amounted to ineffective assistance of counsel. *Strickland* held the constitutional right to effective assistance of counsel has not been provided if: 1) counsel's representation falls below an objective standard of reasonableness; and 2) counsel's errors are so serious as to deprive the defendant of a fair trial, based upon the reasonable probability that, but for those errors, the result would have been different. This two-prong test was fully adopted by the Illinois Supreme Court in *People v. Albanese*, 104 Ill. 2d 504, 473 N.E.2d 1246, 1255 (1984).

Illinois case law underscores defense counsel's ineffectiveness in the present case. In *People v. Vasquez*, 194 Ill. App. 3d 516, 551 N.E.2d 656 (1990), the trial court granted a motion *in limine* limiting the use of a similar prior offense of the defendant since it would be "highly prejudicial." The State nevertheless went beyond the court's limiting instruction when it presented records of the defendant's conviction to the jury, and defense counsel failed to object and/or remind the court of its previous ruling. *Id.* at 659. Defense counsel's failure to take advantage of the trial court's favorable ruling was deemed unacceptable and prejudicial:

> We can only conclude defense counsel erred in failing to remind the court of its earlier ruling . . . we cannot rule out the reasonable probability defendant was prejudiced by the presentation of such information to the jury to the extent of depriving him of a fair trial.

Id.

Defense counsel's mistakes in the present case go beyond those in the above-cited cases. Not only did counsel for Ms. Dreksler fail to take advantage of the trial court's favorable ruling barring evidence of prior possession and use of marijuana, but he was guilty of a greater sin—*he was the one who introduced evidence of the Defendant buying and smok-*

ing marijuana in the first place. Evidence previously ruled inadmissible was suddenly and unforgivably aired to the jury in all its prejudicial glory, simply because defense counsel ineptly introduced the subject himself.

Dreksler's counsel didn't stop there, however. As in *People v. Park*, ___ Ill. App. 3d ___, 615 N.E.2d 753 (1993), Dreksler's counsel committed a series of errors, the combination of which deprived Dreksler of her federal and state constitutional rights to a fair trial. In *Park*, defense counsel: 1) allowed other crimes into evidence without requesting a limiting instruction; 2) elicited damaging testimony during his cross-examination of state witnesses; and 3) allowed prior consistent statements of the complaining witness into evidence without objection. This Court found that the shift in the weight of the evidence brought on by counsel's combined errors was not merely prejudicial, but "devastating." *Id.* at 760. Analogous to *Park*, counsel in the present case elicited damaging testimony of the defendant using marijuana in his cross-examination of Michael Grod, declined to object to the court's ruling to allow more marijuana evidence in, and idly stood by while the State marched unfettered through the "open door" and delved into the growing and harvesting of cannabis in Dreksler's home several years ago.

All of Dreksler's previous involvement with cannabis was highly prejudicial and irrelevant to whether or not she was entrapped into delivering a thousand quaaludes to a government agent. Yet, her attorney allowed the jury to hear it all. The evidence of her buying small amounts of marijuana, smoking marijuana, her ex-husband's growing marijuana, and her brief maintenance of his marijuana plants was so remote, so unprobative, yet so prejudicial, as to have tainted the verdict. There is no minimizing the effect this evidence had on Diane Dreksler's right to a fair trial. Reversal for a new trial is necessary.

The Sixth Amendment guarantees the right to all defendants that they shall receive effective assistance of counsel. Under the strictures of *Strickland v. Washington*, 466 U.S. 668 (1984), this right has been held to mean that a fair trial is not received by the defendant when his counsel's conduct so undermines the adversarial process that the trial cannot be relied as having produced a just result. Counsel's conduct and decisions throughout Petitioner's trial undermined the adversarial process in that there was virtually no adversary to the government's contentions. The trial was thus unreliable as to whether a just result was in fact reached.

CONCLUSION

WHEREFORE Petitioner Diane Dreksler respectfully prays that this Honorable Court grant this petition and issue a writ of certiorari to review the judgment of the Illinois Appellate Court.

Respectfully submitted,

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APPENDIX A

No. 2-93-0444—Filed June 20, 1994

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Lake County.
Plaintiff-Appellee,	)	No. 92-CF-911
v.	)	
DIANE DREKSLER,	)	Honorable Christopher C. Starck,
Defendant-Appellant.	)	Judge, Presiding.

ORDER

Following a jury trial, the defendant, Diane Dreksler, was convicted of delivery and possession of a controlled substance, specifically, 30 grams or more of a substance containing methaqualone, in violation of the Illinois Controlled Substances Act (Ill. Rev. Stat. 1991, ch. 56 1/2 pars, 1402(a)(9) and 1401(a)(9) (now 720 ILCS 570/402(a)(9) and 720 ILCS 570/401(a)(9) (West 1992))). The trial court sentenced the defendant to eight years' imprisonment. Notice of appeal was timely filed. The defendant makes numerous arguments on appeal. We affirm the conviction, but vacate the sentence and remand for resentencing.

The evidence at trial established that the defendant taught at Maple School in Northbrook, Illinois, for 17 years, and eventually became head of the fine arts department.

According to the defendant, on about ten occasions, Richard Hayes and his wife gave the defendant one or two quaaludes. The defendant testified that prior to the incident in the present case, she never purchased quaaludes from Hayes, and she never sold quaaludes.

Michael Grod, a confidential informant in this case, was an acquaintance of the defendant and her former husband for over 20 years. The defendant and her former husband divorced in 1986. The informant remained an acquaintance of the defendant after the divorce and continued to speak to her. In conversations with the informant, the defendant occasionally mentioned her personal use of quaaludes.

On January 13, 1992, Drug Enforcement Agency (DEA) agents arrested Grod (the informant) for growing and possessing over 100 cannabis plants in his home. After his arrest, he immediately agreed to cooperate with the DEA and to become an informant. The informant decided that the sole focus of his cooperative efforts would be the defendant. According to the informant, he knew that he could set the defendant up because she had already talked about quaaludes for the year prior to the incident in the present case.

Following his agreement to become a DEA informant in January 1992, the informant began calling the defendant several times a month. The defendant testified about the content of these conversations.

According to the defendant, on January 14, 1992, the informant called her and told her that the DEA had broken into his house and confiscated his marijuana plants. Approximately one week later, the informant called again, wanting to talk about his arrest.

According to the defendant, in the beginning of February the informant called her and revealed that because of his arrest, he would have to submit to periodic drug testing and could no longer smoke marijuana. The informant mentioned that he wanted and needed something else to get high on. He asked the defendant to call Hayes to get him some quaaludes.

According to the defendant, two days later, the informant called her and asked if she had spoken to Hayes. The defendant responded in the negative. The informant explained that he and an old friend, "Cass," who was really DEA Agent Kestutes Jodwalis, were growing marijuana at "Cass's" (Agent Jodwalis') house. The informant again requested that the defendant call Hayes to get him some quaaludes.

According to the defendant, in mid-February, the informant called her inquiring whether she had talked to Hayes. The defendant told him that she had talked to Hayes, when in fact she had not. She told him that she had talked to Hayes "so that he would stop bothering [her] about getting him quaaludes."

According to the defendant, the next day the informant left a message for her on her recorder, asking if she had heard from Hayes. He asked her to call him if she has. He said that if she did not call, he would call her soon. According to the defendant, in late February the informant again called her and asked her to call Hayes to find out if he could get anything.

According to the defendant, in early March the informant again called her and asked her if she had spoken with Hayes about getting him the quaaludes. The defendant replied, "I've talked to [Hayes]. If he calls me, then I'll call you. If I hear anything I'll let you know, but I'm

in the process of moving. I can't be bothered with this, and I just don't have anything further to say to you."

According to the defendant, during the second week of March, the informant left approximately three or four messages on her answering machine asking her to call him. During the third week of March, the informant continued to call her.

According to the defendant, during the fourth week of March, the informant became more aggressive. The informant told her that he and his friend, "Cass" had $500. He told her that he did not care what Hayes had or what he could get. He asked the defendant to promise him that when she hung up the phone she would call Hayes and get $500 worth of whatever he had. He also asked her to promise that she would call him back, or he would call her. According to the defendant, in the beginning of April, the informant called her a few more times.

On April 6, 1992, at approximately 2:25 p.m., the informant contacted Agent Jodwalis so the DEA could tape a phone call to the defendant. During the telephone conversation, arrangements were made for the informant and "Cass" to meet with the defendant and exchange quaaludes for money. On the evening of April 6, 1992, the informant and Agent Jodwalis met with the defendant at her home in Highland Park. This meeting was recorded by a device worn by the informant. The defendant made a phone call to discuss when she could pick up the quaaludes from Hayes. Agent Jodwalis gave the defendant $490. The defendant drove to a local food store. Agent Jodwalis and the informant followed her and waited in the grocery store parking lot. The defendant drove to Hayes' home and picked up 27 quaaludes. The defendant then went back to the parking lot and handed Agent Jodwalis a white envelope containing 27 quaaludes and $5

change. When Agent Jodwalis asked the defendant if he would contact her for more quaaludes, the defendant said to go through the informant.

The defendant was not arrested after the April 6 delivery. While she was indicted for the April 6 offense, it was not the subject of the charges in the present case. However, over the defendant's objections, the trial court admitted evidence addressing the April 6 transaction.

On April 7, 1992, at approximately 11:30 a.m., the informant engaged the defendant in another tape-recorded telephone conversation concerning a larger purchase of quaaludes. The informant asked the defendant what larger quantity purchase would have to be made to obtain a "cut" in price. The defendant responded that the informant would have to purchase 1000 quaaludes in order to get a break in price.

On April 8, 1992, the informant called the defendant three times to arrange a purchase of 1000 quaaludes for $16,500. That afternoon Agent Jodwalis arrived at the defendant's home wearing a recording device. The defendant met him at the door. The defendant said that Hayes had dropped off the quaaludes earlier and had told her to frisk him for a wire. The defendant patted down Agent Jodwalis' chest and stomach, but did not find his recording device. The two went down to the basement whereupon the defendant handed Agent Jodwalis a Marshall Field's bag containing approximately 1000 quaaludes, and Agent Jodwalis gave her $16,500. The defendant and Agent Jodwalis went back upstairs. The defendant left the money on her sofa in the basement.

Shortly thereafter, DEA agents entered the defendant's home and arrested her. After the defendant was read her *Miranda* rights, she made statements to the agents, agreed to cooperate, and informed them that her source

was Hayes. While the defendant also allowed the agents to tape-record a telephone call to Hayes, the trial court refused to allow the defense to play this tape at trial. Nor would the trial court permit the defense to introduce evidence surrounding the circumstances that prompted the defendant's statement, *i.e.*, the agents' telling her that she would be charged with a Class X felony if she did not cooperate.

At no time during their dealings with the defendant did the informant or Agent Jodwalis come into contact with any "mule" employed by the defendant, nor did they discover her using any drug code words or a pager. Other than the seized quaaludes, no illegal drugs or drug paraphernalia were found in the defendant's home.

In her defense, the defendant called several character witnesses. The trial court ordered the testimony of three character witnesses stricken, and instructed the jury not to consider that testimony in any way. Of the witnesses (two teachers, a photographer, a lawyer, and an investment banker) whose testimony the court did not strike, each testified that the defendant had an excellent reputation for being a law-abiding citizen.

The defendant relied upon the affirmative defense of entrapment at trial. Following seven and one half hours of deliberations during which the jury sent out several questions indicating confusion over the entrapment defense, the jury returned a verdict of guilty.

On March 19, 1993, the defendant appeared in court represented by new counsel. The court entertained arguments on post-trial motions, and denied the motions. The court sentenced the defendant to eight years' imprisonment. The defendant filed a timely notice of appeal.

The defendant's first argument on appeal is that the State failed to prove beyond a reasonable doubt that she was not entrapped. The defense of entrapment is defined in section 7-12 of the Illinois Criminal Code of 1961 which provides:

> "A person is not guilty of an offense if his conduct is incited or induced by a public officer or employee, or agent of either, for the purpose of obtaining evidence for the prosecution of such person. However, this Section is inapplicable if a public officer or employee, or agent of either, merely affords to such person the opportunity or facility for committing an offense in furtherance of a criminal purpose which such person has originated." Ill. Rev. Stat. 1991, ch. 38, par. 7-12 (now 720 ILCS 5/7-12 (West 1992)).

Once a defendant presents some evidence to raise the issue of entrapment, the State must prove, beyond a reasonable doubt, that the defendant was not entrapped. (*People v. Campbell* (1992), 146 Ill. 2d 363, 375.) Thus, the relevant inquiry is whether, upon viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements essential to the criminal conviction beyond a reasonable doubt. *Campbell*, 146 Ill. 2d at 374.

To support a finding of entrapment, the evidence must disclose improper inducement by the State and a lack of predisposition to commit the crime on the part of the defendant. (*People v. Lambrecht* (1992), 231 Ill. App. 3d 426, 434.) A defendant's predisposition to commit an offense is a crucial element in overcoming an entrapment defense. (*People v. Cross* (1979), 77 Ill. 2d 396, 405.) The courts have considered several factors when determining a defendant's predisposition to commit a drug offense: (1) the defendant's initial reluctance or readiness to commit the offense; (2) the defendant's familiarity with drugs; (3)

her willingness to accommodate the drug user's needs; (4) her willingness to profit from the transaction; (5) whether she has a ready source of drugs; (6) her own prior or current use of illegal drugs; (7) her participation in testing or cutting the drugs; (8) whether she was involved in a course of conduct involving similar offense; and (9) whether she had a prior criminal record. (*Lambrecht*, 231 Ill. App. 3d at 435.) Courts may also consider evidence of a defendant's subsequent activities when a defendant pleads entrapment, if the evidence is relevant not the issue of predisposition. *Tipton*, 78 Ill. 2d at 484.

Viewing the evidence presented to the jury, we find that the jury could have found beyond a reasonable doubt that the defendant was predisposed to commit the charged offenses, and it therefore could have rejected the entrapment defense. The evidence indicated that the defendant was familiar with drugs, she had knowledge of a supplier, she was willing to accommodate one who was desirous of obtaining drugs, she profited from the transaction, and she had used illegal drugs in the past. In addition, there was testimony that the defendant had traded quaaludes for marijuana in the past and that she had grown marijuana in her home. We find that this record is sufficient to sustain the jury's verdict.

The defendant's next argument on appeal is that the trial court erred in precluding the defense from cross-examining the informant, who was a critical witness for the State, about growing marijuana as his primary source of income. During cross-examination of the informant, who was the State's first witness, defense counsel verified that the informant had testified that his occupation was as a fence installer. Defense counsel then proceeded to pose the following question:

> "Is it not a fact, Mr. Grod, that for at least the past 10 to 12 years that [*sic*] your main source of income has been that of a marijuana grower or dealer?"

A sidebar ensued, during which defense counsel indicated that he should be able to question the informant about his occupation, his source of income, and his marijuana growing over the past 10 to 12 years. In response to the trial court's inquiry as to any evidence besides the 104 plants found growing in the informant's home on January 13, 1992, defense counsel stated that the defendant would testify that she had known the informant to grow marijuana as his main source of income for 10 to 12 years. The prosecutor argued that the defendant's statement would be without support and that defense counsel could not perfect the attempted impeachment.

Defense counsel then altered his argument to focus on the need for the cross-examination as proof of the informant's lack of credibility, bias and motive for testifying. The trial court stated that the informant's alleged longtime occupation as a marijuana grower would not impact upon his bias and motive for testifying. Instead, the court stated that the January 13, 1992, growing incident for which the informant was arrested formed the only basis for motive, as that involved the "federal rap" he faced. The court then limited cross-examination to the specific charges against the informer in this case. The trial court sustained the State's objection to the question, the testimony was stricken, and the jury was advised to disregard it.

Later in the cross-examination, defense counsel asked the informant whether he had supplied individuals other than the defendant with marijuana during the past five years. Again, the State objected, and the trial court sustained the objection.

The defendant now argues that her constitutional right to confrontation was violated by the trial court's decision to restrict her cross-examination of the informant. The defendant attacks the trial court's determination on two fronts: first she argues that an accused has a right to cross-examine a witness about his occupation, and secondly, she asserts her right to establish the informant's bias, interest, or motive for testifying.

A defendant has a right to question a witness concerning any matter which goes to explain, modify, or discredit what he testified to on direct examination. *People v. Barr* (1972), 51 Ill. 2d 50,51.

In the present case, since the informant had testified on direct examination that his occupation was as a fence installer, we find that the inquiry into his occupation as a marijuana dealer was permissible for purposes of impeachment. (See *Barr*, 51 Ill. 2d at 51.) Thus, we find that the trial court erred in restricting the defendant's cross-examination of the informant on this matter.

The State argues that the trial court's error was harmless. In *People v. Wilkerson* (1981), 87 Ill. 2d 151, the Illinois Supreme Court stated:

> "The test for harmless constitutional error is whether the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967), 386 U.S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824.) Three approaches for measuring error under *Chapman* have been noted: (1) focusing on the error to determine whether it might have contributed to the conviction [citation]; (2) examining the other evidence in the case to see if overwhelming evidence supports the conviction [citation]; (3) determining whether the evidence is cumulative or merely duplicated properly admitted evidence [citation]." *Wilkerson*, 87 Ill. 2d at 157.

There is nothing in the record to suggest that the outcome of the case would have been any different if defense counsel would have been permitted to pursue cross-examination of the informant regarding his occupation as a marijuana dealer. The informant testified that he had supplied the defendant with marijuana for somewhere between one and five years, that he had helped her grow marijuana in her home because she had no expertise, and that he and the defendant had traded marijuana for quaaludes in the past.

The defendant testified that the informant told her that he had grown marijuana as his main source of income for 15 years. She further testified that he had supplied her with marijuana, through gift or sale, for 20 years. The jury also heard testimony that the informant was arrested for growing marijuana, was approached by the DEA with the opportunity to cooperate in return for consideration during this court case, and signed an agreement to serve as a confidential informant.

All of this testimony assures that the jury was familiar with the informant's marijuana growing and selling over the years, and his potential reason for false testimony against the defendant. It is very unlikely that defense counsel's cross-examination would have revealed anything more damaging to the informant's credibility. There is no indication that the determination would have been different if defense counsel had been permitted to ask the informant if his primary source of income was derived from marijuana sales. In addition, the defendant describes this as a close case, but we disagree. We find that overwhelming evidence supports the defendant's conviction in this case. Finally, the impeachment evidence merely duplicated properly admitted evidence. As discussed above, the record is replete with testimony about the informant's history of growing and selling marijuana.

We find that the trial court's error in restricting the defendant's cross-examination of the informant was harmless beyond a reasonable doubt. See *Wilkerson*, 87 Ill. 2d at 157.

The defendant's next argument on appeal is that she was denied effective assistance of counsel when her counsel injected argument before the jury and solicited testimony from the informant regarding the defendant's previous marijuana possession and use. The defendant filed a motion *in limine*, requesting that evidence of her past use and possession of marijuana be barred. The trial court ruled that evidence of the defendant's possession or use of marijuana would not be permitted, but any evidence of the defendant's sale or distribution of marijuana and the defendant's past use of quaaludes would be admissible.

During his opening statement, defense counsel stated: "You will hear things about [the defendant]. [The defendant] has used marijuana in the past." Later, in his cross-examination of the informant, defense counsel solicited testimony that he had supplied the defendant with marijuana over a period of years.

Based on defense counsel's opening statement and his cross-examination of the informant, and at the urgings of the prosecution, the trial court reversed its previous ruling barring evidence of marijuana use and ruled that any and all evidence relating to the defendant's past use of marijuana would be admissible. The State was then permitted on redirect examination of the informant to explore in great detail the defendant's prior use of marijuana. In addition, the State inquired into how in the years prior to 1987, the defendant's ex-husband had grown marijuana in the defendant's home; the presence of marijuana plants in

the defendant's home for a few months after her husband's departure; and her maintaining those plants.

To establish ineffective assistance of counsel, the defendant must establish that counsel's representation fell below an objective standard of reasonableness (*Strickland v. Washington* (1984), 466 U.S. 668, 688, 80 L. ed. 2d 674, 693, 104 S. Ct. 2052, ___), and that there is a reasonable probability that, were it not for counsel's professional shortcomings, the result of the proceeding would have been different (*Strickland*, 466 U.S. at 694, 80 L. Ed. 2d at 698, 104 S. Ct. at ___). Effective assistance of counsel refers to competent, not perfect, representation. (*People v. Ortiz* (1987), 155 Ill. App. 3d 786, 795.) On review, great deference must be given to trial counsel's conduct (*People v. Uselding* (1991), 217 Ill. App. 3d 1063, 1075), and we will not review matters involving the exercise of judgment, discretion, trial tactics, or trial strategy (see *People v. Arnett* (1991), 217 Ill. App. 3d 626, 636). In reviewing counsel's conduct, courts consider the totality of the circumstances, not isolated instances that, with the benefit of hindsight, one can see might have been handled differently. *People v. McNeal* (1987), 160 Ill. App. 3d 796, 804.

The State argues, and we agree, that defense counsel's decision to usher in evidence of the defendant's past marijuana use was trial strategy. Because she was presenting a defense of entrapment, it was important for the defendant to emphasize the bad character of the informant whom she claimed set her up. Much of the evidence that related to the informant's growth, use, and distribution of marijuana, and reflected negatively on his character. In addition, defense counsel was aware that the informant could testify that he engaged in previous drug deal in which he traded with the defendant quaaludes for mari-

juana. Such evidence would be permitted under the trial court's initial ruling on the motion *in limine*, and was, in fact, elicited in the informant's testimony.

Such testimony revealing the defendant's previous marijuana use was permitted even under the ruling *in limine*, counsel's decision to present her use up front, and to use the testimony to discredit the informant, could be considered good trial strategy. Additionally, the defendant's direct testimony included related information, an indication of the continuation of counsel's trial strategy on this point. Defense counsel could have reasonably determined that any prejudice to the defendant resulting from this evidence was outweighed by the damage done to the informant's credibility.

Defense counsel's decision was a tactical one which, in retrospect, proved unsuccessful, but does not demonstrate incompetence. (See *Arnett*, 217 Ill. App. 3d at 636.) Therefore, we find no ineffective assistance of counsel.

The defendant's next argument on appeal is that the trial court erred in ruling that she could not adduce any evidence concerning the circumstances of her post-arrest conduct. Following the completion of the April 8, 1992, transaction with Agent Jodwalis, the defendant was arrested in her home by DEA agents. DEA agents immediately sought the defendant's cooperation. Defense counsel stated during arguments on the pre-trial motion that the supervising DEA agent on the scene advised the defendant that she would be facing Class X charges, mandating a minimum of six years in jail, if she did not cooperate. The defendant agreed to cooperate. She made statements to the agents in which she identified Hayes, her supplier, and further related that Hayes would be coming over to pick up the money. In addition, the defendant phoned

Hayes after the arrest. The agents tape-recorded this telephone call.

These post-arrest events precipitated a number of pre-trial requests by the State and the defense. The defense filed a motion to suppress confession, predicated upon allegation that the defendant's post-arrest statements were involuntary and the product of police coercion, unfulfilled promises, and her distressed state of mind, as well as a failure to comply with Miranda. Following an evidentiary hearing, the trial court denied the defendant's motion.

The State moved to exclude any mention that the defendant was charged with a Class X offense. Defense counsel emphasized that following the arrest, the agents had told the defendant that she was facing a Class X charge if she did not cooperate. The trial court ruled that the defense could not adduce such evidence.

The State also moved *in limine* to preclude the defense from introducing the tape-recording of the post-arrest telephone call between the defendant and Hayes. While recognizing that the recording might help an entrapment defense, the State maintained that the defense could not introduce the recording because it had been suppressed. The recording was suppressed because the State did not introduce any evidence in response to the defendant's pre-trial motion to suppress all tape-recordings.

In considering the pre-trial motions *in limine*, the trial court declared it had "trouble visualizing the relevance of conduct after the arrest." While making *in limine* rulings, the trial court later stated that it did not want evidence introduced regarding the "specifics" of post-arrest conversations.

During direct examination by the State, Agent Jodwalis testified that after he gave the verbal arrest signal on April 8, 1992, members of the arrest team entered the defendant's house and placed her under arrest. Agent Jodwalis testified that he observed *Miranda* rights being read to the defendant on two occasions. Agent Jodwalis testified that after two *Miranda* warnings, the defendant agreed to cooperate and told DEA agents that her source of the quaaludes was Hayes, and that Hayes was going to come by to pick up the money. This was the extent of testimony in the record regarding the defendant's post-arrest conduct.

During Jodwalis' cross-examination, the defendant sought to introduce evidence of the defendant's post-arrest conduct. The State objected. Consistent with its pre-trial remarks, the court ruled that the defense could not present evidence concerning the defendant's conduct after the arrest. Thus, the defendant was precluded from introducing the tape-recording of her post-arrest conversation with Hayes, or evidence that she telephoned Hayes following the arrest. In addition, the trial court's pre-trial rulings prohibited the defendant from introducing evidence regarding statements made by the police that induced the defendant's post-arrest statements which the State introduced into evidence at trial.

The defendant argues that to the extent that she was precluded from eliciting further evidence of the post-arrest activity, she was denied her right to put on a defense. The defendant argues that further evidence of her conduct immediately following her arrest would have assisted the jury in finding her a "native and trusting soul" rather than an "experienced and cavalier drug dealer."

The State argues, and we agree, that the defendant's nervous behavior at the time of her arrest and her

willingness to cooperate with DEA agents at that time do not contribute to showing that she was entrapped in her sale of the quaaludes. The defendant's theory that evidence of her nervous behavior and willingness to cooperate upon arrest would have led the jury to conclude that she was entrapped is unsupported. The defendant's nervous behavior and willingness to cooperate upon arrest are not probative of her lack of predisposition to commit the offense. Therefore, we find that the trial court properly excluded evidence of the defendant's post-arrest behavior.

In addition, we find that the trial court properly excluded evidence regarding statements made by the agents which the defendant claims induced her post-arrest statements. In this case, voluntariness of the defendant's statements was not an issue at trial. Therefore, the statements made by the agents, which may have induced the defendant to make statements or to cooperate, were irrelevant and properly excluded. We find *People v. Melock* (1992), 149 Ill. 2d 423, which was cited by the defendant, distinguishable since voluntariness was at issue in that case.

We also find that the post-arrest tape recording of the conversation between the defendant and her source was properly excluded as irrelevant. We find *People v. Williams* (1985), 109 Ill. 2d 327, which was cited by the defendant, distinguishable since the tape-recordings in *Williams* were of the defendant's own interviews after his arrest, and the officers in that case testified to the content of the interviews at trial. In the present case, the tape-recording was of a post-arrest telephone conversation between the defendant and her source, and the agents did not testify to the content of that conversation. The content of that conversation was irrelevant in this case.

The defendant's next argument on appeal is that the trial court erred in striking the testimony of three of her character witnesses. The defendant presented the testimony of eight character witnesses. Each of these witnesses testified to the defendant's good reputation for being a law-abiding citizen. In five instances, the testimony of the witnesses was allowed to stand, but in three cases the trial court granted the prosecutor's request to strike the testimony. The defendant now argues that her ability to present a defense was greatly impaired by the trial court's action in striking character witness testimony, and requests reversal and a new trial.

The defendant called Robert Kalbfell, a Chicago police officer who had known the defendant for 23 years, as one of her character witnesses. Kalbfell saw the defendant approximately twice a month. He testified that he was familiar with the defendant's reputation in the community where she resided and among her associates and neighbors. Kalbfell testified that the defendant had an excellent reputation for being a law-abiding citizen.

On cross-examination, Kalbfell related that he was familiar with the defendant's reputation because they grew up and lived in the same neighborhood and had a common circle of friends. Kalbfell named the friends, including one who lived in Inverness whom Kalbfell saw a couple of time a month. Kalbfell testified that the circle of friends gather with the defendant at least once a month. Pressed on cross-examination, Kalbfell stated that it was "common knowledge" that the defendant had a reputation for being a law-abiding citizen. Kalbfell observed that one gets a general idea of another's reputation by being with her. The State attempted to get Kalbfell to admit that his testimony about the defendant's reputation only amounted to an opinion. However, Kalbfell responded

it was stronger than an opinion. While Kalbfell admitted that he had never outwardly discussed that the defendant was a law-abiding citizen, he stressed that nobody had ever said anything bad about the defendant.

The State moved to strike Kalbfell's testimony on the grounds that the defense had not laid sufficient foundation for any discussions concerning anything about the defendant's being a law-abiding citizen. Defense counsel responded that, as a practical matter, one must demonstrate good reputation based upon no person's ever having said anything negative about a person's character trait for being a law-abiding citizen. The trial court struck Kalbfell's testimony in its entirety and instructed the jury that they were not to consider it in any way.

Arlene Rosenthal, a housewife and mother of six children, testified that she had known the defendant for about three years through Maple Junior High School. Rosenthal volunteered at the school where the defendant taught. She saw the defendant about once a week for three years. Rosenthal testified that the defendant had an excellent reputation for being a law-abiding citizen in the community where she resided and among her associates and neighbors.

On cross-examination, Rosenthal stated that she based her testimony on conversations with teachers at the school, school board members, and parents. Rosenthal further testified that she had substantial contact with the defendant because she was very interested in art and her daughters were the defendant's students. Rosenthal pointed out that she had discussions with teachers and parents about how the defendant does a wonderful job with the kids. Rosenthal stated that she did not know if conversation of whether the defendant was a law-abiding citizen ever arose, but she emphasized that the defendant

was a good person, an excellent teacher, and wonderful confidant for the children.

On redirect examination, Rosenthal was asked if there had been any conversation with regard to whether the defendant was a law-abiding citizen. She answered that there had not.

The State moved to strike Rosenthal's testimony on grounds of insufficient foundation. The trial court struck the testimony in its entirety and instructed the jury not to consider it in any way.

Finally, Lewis Blond, a teacher at Maple Junior High School, testified that he had know the defendant for the past ten years as a colleague at the school. In fact, the defendant was Blond's supervisor. He had seen the defendant just about ever day for the past ten years. Blond testified that the defendant had a reputation for being a law-abiding citizen within the community where she resided and among her associates and neighbors.

On cross-examination, Blond stated that his knowledge of the defendant's general reputation as a law-abiding citizen stemmed from conversations with other colleagues and parents. He pointed particularly to discussions in the teachers' lounge following the defendant's arrest. Before that time, Blond could no recall the actual subject of the defendant's law-abiding nature coming up in conversations at the school.

The State moved to strike arguing that reputation after the arrest was irrelevant. The trial court, however, noted that Blond's testimony was not limited to reputation after the arrest, and that Blond had participated in conversations after the arrest. However, the next day the trial court struck Blond's testimony in its entirety and instructed the jury not to consider it in any way.

When a defendant raises the defense of entrapment, her character is directly at issue. (*People v. Perez* (1991), 209 Ill. App. 3d 457, 465.) In order to show that her character traits are inconsistent with the commission of the offense charged, the defendant may introduce evidence of her good character and general reputation for the specific character traits which are inconsistent with the commission of the offense. *Perez*, 209 Ill. App. 3d at 465.

"A trial court's ruling regarding competency to testify as a reputation witness is a determination that will not be disturbed absent an abuse of discretion." (*People v. La Fiura* (1981), 93 Ill. App. 3d 1099, 1104.) A reputation witness must be shown to have adequate knowledge of the subject. (*People v. Reeves* (1935), 360 Ill. 55, 65; *People v. Bascomb* (1979), 74 Ill. App. 3d 392, 395.) It is not necessary for a reputation witness to be able to testify that he heard the defendant's reputation being discussed, since "[the defendant's] reputation may be known though never generally discussed." *People v. Dunham* (1931), 344 Ill. 268, 274.

The fact that a witness heard no discussion of the defendant's reputation does not justify the inference that the witness has no basis upon which to testify about the defendant's general reputation. (*People v. Pieper* (1951), 410 Ill. 15, 19.) While actual discussion or conversation regarding the character trait relevant at trial are not mandatory, a witness must show he possessed an awareness of the defendant's reputation because of his association with the defendant's friends and neighbors, not that he merely had a personal opinion on it. *Bascomb*, 74 Ill. App. 3d at 394-95.

Character evidence should be confined to proof of the defendant's general reputation in the community at or prior to the commission of the offense. (*People v. Lucas*

(1992), 151 Ill. 2d 461, 484.) It must not be allowed to cover reputation after the commission of the offense or what was said after the offense with reference to the character of the accused either before or after the offense. *People v. Willy* (1921), 301 Ill. 307, 317-318; *People v. Wright* (1992), 234 Ill. App. 3d 880, 895.

We find that the trial court erred in striking the witnesses' character testimony, since each of them offered a sufficient basis to establish that he or she had adequate knowledge of the defendant's reputation for being a law-abiding citizen. Kalbfell testified that he grew up with the defendant, knew her for 23 years, saw her regularly, had a common circle of friends, and never heard anyone say anything negative about her character. Rosenthal testified that she met with the defendant once a week for three years, had discussions concerning the defendant with teachers, school board members, and fellow parents, and never heard any person say anything about the defendant's not being a law-abiding citizen. Blond testified that he saw the defendant every day for ten years and based his knowledge of the defendant's reputation on discussions with teachers and parents.

On direct examination, each of the witnesses testified that he or she knew that the defendant had a good reputation for being a law-abiding citizen. The fact that the witnesses may not have been able to pinpoint discussions in which the defendant's reputation for being a law-abiding citizen was discussed did not render the testimony without foundation. Specific prior discussions about a defendant's reputation are not required for a character witness to give reputation testimony. (See *Dunham*, 344 Ill. at 274; *Pieper*, 410 Ill. at 19; *Bascomb*, 74 Ill. App. 3d at 294-95.) Here, none of the stricken witnesses indicated that he or she ever had heard anything negative about the

defendant's reputation for being a law-abiding citizen. Each had significant contact with the defendant over a number of years and with various other individuals who also knew the defendant, and, thus, had knowledge of her reputation. Accordingly, we find that the trial court erred in striking the testimony.

Though a portion of Blond's testimony dealt with post-arrest conversations, his knowledge of the defendant reputation was based upon having known her and her close associates for over ten years. Only after being pressed by the State for specific conversations did he refer to post-arrest discussions. Based upon these facts, the general knowledge he had acquired of the defendant's reputation was sufficient. Only the portion of Blond's testimony which was based on conversations following the defendant's arrest was inadmissible and properly denied. See *Willy*, 301 Ill. at 317-18; *Wright*, 234 Ill. App. 3d at 895.

Although we find the trial court erred in striking the witnesses' testimony, we also find that the error was harmless. (See *Wilkerson*, 87 Ill. 2d at 157.) The defendant presented eight character witnesses. Five witnesses' testimony to the defendant's general reputation as a law-abiding citizen was permitted to stand. The jury heard adequate testimony to the defendant's good character. The testimony which was stricken was cumulative.

The defendant next argument on appeal is that the trial court erred in precluding her character witnesses from testifying that she had a good reputation for honesty. During a hearing on pre-trial motion, the defendant indicated that she would be presenting reputation evidence by means of witness testimony. The State represented a ruling from the trial court as to those character traits pertinent to the charged offense. The trial court determined that evidence concerning the defendant's reputation as a

law-abiding citizen would be permitted, but ruled that honesty, integrity, truth, and veracity were not pertinent to an unlawful delivery charge or to an entrapment defense, and that evidence of those traits would not be admitted. The defendant argues that the trial court's decision prevented her from presenting evidence regarding a significant issue in the case, and requests for reversal on that basis.

There exist two circumstances under which evidence of a defendant's reputation for truth and veracity is admissible: first, when it relates to an issue involved in the crime charged, and secondly, when the defendant's reputation for truth and veracity has been attacked as being bad. *People v. Griffith* (1978), 56 Ill. App. 3d 747, 756.

After a careful review of the record in this case, we find neither circumstance present here. Truth and veracity are not related to the crime of unlawful delivery of a controlled substance, and the defendant's reputation for truth and veracity was at no time attacked. Therefore, we find that the trial court correctly rejected the testimony concerning the defendant's reputation for truth and veracity. See *Griffith*, 56 Ill. App. 3d at 756.

Our ruling considers the defendant's argument that her credibility was repeatedly and vigorously attacked by the State. A review of the record, however, discloses only careful cross-examination of the defendant. The State attempted to clarify apparent discrepancies between the defendant's testimony and that of the informant and Agent Jodwalis. In addition, the State cross-examined the defendant about a prior inconsistent statement. At no time during cross-examination did the State attack the defendant's reputation for truth and veracity. Thus, the issue of her honesty did not arise in that manner.

The defendant's next argument on appeal is that the trial court erred in barring her from introducing evidence that she had no prior criminal record. The State argues, and we agree, that the defendant has failed to preserve this issue for appeal. There was no objection made by the defendant at the hearing where the State's motion *in limine* was granted. Furthermore, the defendant failed to address this issue in either her post-trial motion or her supplemental post-trial motion. Failure to make a timely objection and failure to raise alleged error in a post-trial motion result in a waiver of the issue on appeal. *People v. Williams* (1990), 139 Ill. 2d 1, 14.

The defendant's next argument on appeal is that by its handling of the jury's notes during deliberations, the trial court placed undue emphasis on the other-crimes evidence, while diminishing the entrapment defense. On the final day of the trial, the jury began its deliberations at approximately 1:00 p.m. Sometime between 2:00 p.m. and 3:00 p.m., the jury requested a definition of entrapment. After conferring with counsel for both sides, the judge gave the jury the agreed response which was that the jury had an instruction which have the legal definition of entrapment. The jury later responded, "We need it in writing. Please we have all differing meanings." The record does not contain a response to this question. The jury later sent another note saying they needed a dictionary. After conferring with counsel for both sides, the judge gave the jury the agreed response which was : "Regarding the meaning of any words you should rely on the instruction of law and your ordinary experiences in the affairs of life."

Finally, late in the deliberations, the jury inquired: "If [the defendant] was entrapped on April 6 was she also entrapped *[sic]* on April 8? Or do we have to consider both

days as one event?" The judge believed that the jury was confused and that he could not let them flounder. The State asked the judge to restate the other-crimes instruction. Defense counsel strenuously and repeatedly objected to such a procedure on grounds that the court should not single out just one instruction since the jury would give undue weight to that instruction. Defense counsel argued, *inter alia*, that the entrapment instruction should be included in any response. The trial court refused to include an entrapment instruction in the response. Rather, in a written instruction sent to the jury, the trial court basically reiterated the proof of other crimes instruction. The instruction read:

> "The defendant is charged with the conduct which took place on April 8.
>
> The evidence that you heard with respect to conduct of April 6, or other conduct, was received on the issue of defendant's intent, motive, design, knowledge and predisposition and may be considered by you only for that limited purpose.
>
> It is for you to determine whether the defendant was involved in any prior conduct and, if so, what weight should be given to that evidence on the issue of intent, motive, design, knowledge and predisposition.
>
> Please consider this together with *all* of the other instructions during your deliberations."

Defense counsel warned that an instruction singling out proof of other crimes, but not mentioning entrapment, would soon coerce a verdict in the State's favor. Approximately an hour and a half later, the jury returned a verdict of guilty on both counts.

The defendant argues that the court's response directed the jury's attention to the other-crimes evidence, favoring the State and prejudicing her. We disagree.

If a jury asks a specific question on a point of law arising from facts about which there is doubt or confusion, a trial court should respond to the question in an attempt to clarify the confusion. *(People v. Pryor* (1989), 181 Ill. App. 3d 865, 871.) However, a trial court may, in the exercise of its discretion, refrain from answering inquiries of the jury when the instructions given are readily understandable and sufficient to explain the relevant law. *Pryor*, 181 Ill. App. 3d at 871.

During a conference with counsel on this matter, the trial judge expressed his concern over the jury's obvious confusion as to how they should view the events of April 6. Evidence of the April 6 transaction was offered for a limited purpose, and the jury's questions indicated potential misuse of that evidence. The trial judge correctly believed that it was his duty to prevent the jury from further confusion. He determined that a restatement of the instruction on other-crimes evidence, combined with the caution that the jurors must consider all of the instructions, would adequately quell the jury's confusion.

Reiteration of an instruction in response to a jury question has been held appropriate in Illinois. (See *People v. Caballero* (1984), 102 Ill. 2d 23, 42-43, *modified on other grounds* (1989), 126 Ill. 2d 248.) In the present case, the jury received Illinois Pattern Jury Instructions, Criminal, No. 3.14 (__ ed. 19__), regarding evidence of other crimes, which read:

> "Evidence has been received that the defendant has been involved in offenses other than that charged in the indictment.
>
> This evidence has been received on the issues of the defendant's intent, motive, design, knowledge and predisposition and may be considered by you only for that limited purpose.

> It is for you to determine whether the defendant was involved in those offenses and, if so, what weight should be given to this evidence on the issue of intent, motive, design, knowledge and predisposition."

The trial court's response to the jury's questions was nothing ore than a restatement of this instruction and a direction for the jury to consider all instruction in its deliberations. Failure to aid the jury on this question might have encouraged misapplication of the evidence.

The defendant states that the trial court showed favoritism toward the State, because it restated the other-crimes instruction, but refused to restate the entrapment instruction when the jury asked for a definition of entrapment. We disagree. The jury's question about entrapment came early in the deliberations, and the trial judge, in response, referred the jury to the entrapment instruction. Upon receiving the jury question which is at issue here, the trial court expressed concern that after several hours, the jury appeared to be confused. The trial court properly found that it was obvious that the jury needed help to alleviate ongoing confusion and a restatement of the instruction regarding proper use of the April 6 evidence was warranted. The trial court properly reiterated a neutral statement of the law from which no prejudice to the defendant resulted.

The defendant's next argument on appeal is that the cumulative effect of the error on this case deprived her of a fair trial. Having already found that the defendant's earlier arguments were waived, without merit, or harmless error, we find that this claim is also without merit.

The defendant's next argument on appeal is that the trial court violated her right to due process by increasing her punishment because she exercised her constitutional right to a jury trial. Prior to trial, the court conducted a

conference pursuant to Illinois Supreme Court Rule 402 (134 Ill. 2d R. 402). During post-trial hearings, the trial court expounded upon its recollection of the off-the-record 402 conference:

> "Let me tell you what my recollection is of the 402 conference. [Defense counsel] did in fact ask the State if they would reduce it down to something different than the Class X, and they said no, we are not. We are not going to reduce it. We are not going to reduce it from an X. We got her on the X and we going to trial. What we will do is guarantee you six years if you save us—not the cost, but if you save us from going to trial. We will give you guaranteed six if you plead and we will drop the other case. He said to us that his client said she lost everything anyway, she's got nothing to lose, maybe she would win this case."

After the 402 conference and while on the record, the judge stated that he had learned about the defendant's background and a bit about the facts of the case including: the amount of quaaludes charged in this case, that the matter was on tape, that the defendant had been set up by an informant she had known for a great number of years, and that the defendant, if she went to trial, would raise the defense of entrapment. The trial judge indicated that it would accept the plea and impose the minimum sentence of six years based on the facts of the case known to him. The defendant rejected the offer of six years' imprisonment and went to trial. After a jury trial, she was sentenced to eight years' imprisonment. The defendant now argues that her constitutional right to due process was violated because the trial court increased her sentence as punishment for her exercising her right to a jury trial. We disagree.

The cases cited by the defendant do not support her argument. *North Carolina v. Pearce* (1969), 395 U.S. 711,

23L. Ed. 656, 89 S. Ct. 2072, and *People v. Carpenter* (1971), 2 Ill. App. 3d 372, involved retrials in which defendants received harsher sentences following new trials. The new trials had been granted because of constitutional errors in the initial trials. The Supreme Court held that while there is no absolute bar to the imposition of a more severe sentence upon retrial, the reasons for imposing a more severe sentence in such a situation must appear affirmatively in the record. *Pearce*, 395 U.S. at 723-26, 23 L. Ed. 2d at 668-70, 89 S. Ct. at ___.

In *People v. Love* (1985), 139 Ill. App. 3d 104, 116, which was also cited by the defendant, the defendant's sentence was increased without comment after the defendant withdrew his guilty plea and was convicted by a jury. The appellate court found that the increase violated the defendant's right to due process where no justification was found in the record, and the increase was assumed punishment for the defendant's exercise of his right to a jury trial. *Love*, 139 Ill. App. 3d at 116-18.

The instant case is distinguishable from those cited by the defendant. This case does not involve a resentencing. The trial court never sentenced the defendant to six years' imprisonment. It merely indicated that it would be agreeable to a negotiation pursuant to Supreme Court Rule 402, wherein the State would seek six years' imprisonment in exchange for a plea of guilty to the Class X offense. The plea was never entered, as the defendant rejected the offer. At the time the plea proposal was discussed, the trial judge stated that he had been given a bit of background on the case. Following the jury trial, the judge was apprised of all of the evidence, as well as mitigating and aggravating factors, and based upon all of the evidence, he sentenced the defendant to eight years' imprisonment. No comment regarding the difference between

six and eight years' imprisonment was necessary because the defendant was never sentenced to six years' imprisonment.

The defendant also cited *People v. Moriarty* (1962), 25 Ill. 2d 565, and *People v. Young* (1974), 20 Ill. App. 3d 891. These cases are distinguishable in that they both involved statements by the trial court confirming that increased sentences were given because the defendants chose to plead not guilty rather than guilty. (*Moriarty*, 25 Ill. 2d at 566-67; *Young*, 20 Ill. App. 3d at 894-95.) Whether a defendant received a harsher sentence because she demanded a trial must be clearly established by the evidence. (*People v. Perry* (1971), 47 Ill. 2d 402, 408-09.) This record contains no evidence to support the defendant's argument that the judge increased her punishment for exercising her constitutional right to a jury trial.

The defendant's next argument on appeal is that her eight-year sentence is excessive and unfair in light of the eight-month sentence received by Hayes, her supplier. We disagree.

It is generally held that defendants who are similarly situated should not receive grossly disparate sentences. (*People v. King* (1988), 165 Ill. App. 3d 464, 472.) However, the defendant and Hayes cannot be considered similarly situated. For example, Hayes was charged and sentenced in Federal court under a Federal statute, while the defendant was charged and sentenced in State court under a State statute.

In addition, Hayes entered into a negotiated plea agreement, and the defendant exercised her right to a jury trial. Where the defendant receiving the lighter sentence receives the sentence pursuant to a plea agreement, that sentence is no basis for comparison. (*King*, 165 Ill. App. 3d at 472.) Thus, we concluded that Hayes' eight-month

sentence cannot be used as a basis for comparison. See *King*, 165, Ill. App. 3d at 472-73.

The defendant's final argument on appeal is that her sentence was based upon improper considerations. Sentencing is a matter within the trial court's discretion, and a reviewing court will not disturb a sentencing order unless it represents an abuse of that discretion. (*People v. Harrison* (1987), 156 Ill. App. 3d 39, 42.) However, when a sentencing court improperly considers a factor in aggravation and it cannot be determined how much weight that factor was accorded, a new sentencing hearing is required. (*People v. Conover* (1981), 84 Ill. 2d 400, 405.) A factor necessarily implicit in a crime should not be used as an aggravating factor when sentencing for that crime. *Conover*, 84 Ill. 2d at 404.

In the present case, the trial court considered, among the aggravating factors, that the defendant received compensation for committing offense. As this court stated in *Harrison*, "compensation is a factor implicit in most deliveries of a controlled substance and that factor thus falls within the prohibition established in *Conover*." (156 Ill. App. 3d at 42.) We conclude that the trial court erred in considering the compensation received as an aggravating factor in sentencing the defendant.

In addition, the record indicated that the trial court may have considered societal harm caused by drugs in sentencing the defendant. The harm caused by delivery of controlled substances is inherent in the offense. (See *People v. Atwood* (1990), 193 Ill. App. 3d 580, 592-93.) Nothing in the record here indicated that the conduct of the defendant had any more propensity to cause them harm than that which was inherent in the offense. (*Atwood*, 193 Ill. App. 3d at 593.) Accordingly, we hold that any consideration of this factor in aggravation also was error.

The State argues that we need not remand for resentencing because the weight placed on the improper factors as so insignificant that it did not lead to a greater sentence. (*People v. Bourke* (1983), 96 Ill. 2d 327, 332.) However, we cannot determine from the record that the weight placed on the improperly considered aggravating factors was so insignificant that it did not lead to a greater sentence. The cause must therefore be remanded for resentencing. *Bourke*, 96 Ill. 2d at 332.

For all of the foregoing reasons, we affirm the conviction, but vacate the sentence of the circuit court of Lake County and remand for resentencing.

Affirmed in part; vacated in part and remanded for resentencing.

GEIGER, J. with WOODWARD and COLWELL, JJ., concurring.

APPENDIX B

77506

ILLINOIS SUPREME COURT
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October 6, 1994

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No. 77506 - People State of Illinois, respondent, v. Diane Dreksler, petitioner, Leave to appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this court will issue to the appellate court on October 28, 1994.